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In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ET AL., PETITIONERS

v.

JEFF D., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the court of appeals erred in prohibiting the parties in a civil rights class action from engaging in settlement negotiations intended to produce a comprehensive settlement agreement resolving both the merits of the litigation and any claim to attorney's fees that might be advanced by the plaintiffs.

2. Whether, assuming that the court of appeals correctly invalidated the attorney's fee provision of the settlement agreement in this case, it nevertheless erred in requiring petitioners to comply with the remainder of the agreement.

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INTEREST OF THE UNITED STATES

This case presents the important question whether parties to litigation may properly engage in simultaneous settlement negotiations encompassing both the merits of a case and any claim of the plaintiffs to attorney's fees. The decision of the court below, essentially imposing a per se ban on the simultaneous negotiation of the merits and attorney's fee claims, significantly impairs the public policy of encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an unnecessary increase in the workload of the already overburdened federal courts. In addition, as the most frequent litigant in the federal courts, the United States faces potential liability for attorney's fees under a host of fee-shifting statutes. The decision below, by prevent-

ing pre-judgment negotiation of attorney's fee issues, will make it difficult for the United States to ascertain precisely what its liability would be under a proposed settlement, thereby eliminating the very certainty that makes settlement attractive. As a result, the rule adopted by the court of appeals may frustrate or block settlement in many cases in which the United States is a defendant. Accordingly, the United States joins petitioners in urging reversal of the court of appeals' decision.

STATEMENT

1. In August 1980, respondents filed this action under 42 U.S.C. 1983 in the United States District Court for the District of Idaho on behalf of a class of mentally and emotionally handicapped children institutionalized in the State of Idaho. Respondents alleged that petitioners, several Idaho state health and education officials, were violating the federal and state constitutions and numerous federal and state statutes by failing to provide them with adequate educational and mental health services. The claims pertaining to educational services were settled with reasonable dispatch, and class counsel agreed to waive an attorney's fee (Pet. 5-6; Br. in Opp. 1). However, respondents' claims involving mental health services were litigated for over two years (Pet. App. 18a). Although settlement negotiations began at an early date, they reached an impasse in December 1981. Thereafter, both sides moved for summary judgment. On July 26, 1982, the district court granted partial summary judgment to petitioners as to all claims except those arising under the United States Constitution and one provision of Idaho law; as to those claims, the court concluded that genuine issues of material fact precluded summary judgment (J.A. 56-57). The remaining state law claim was subsequently dropped in light of *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).

Following the district court's summary judgment ruling, the parties renewed their settlement talks. One week

before trial, the parties reached agreement on a settlement of the remaining claims, under which petitioners agreed to grant much of the substantive relief sought on behalf of the class (J.A. 95-104).

During the negotiations, petitioners stated that their agreement to the settlement was conditioned on respondents' counsel's willingness to waive attorney's fees, as he had done in the settlement of the educational services claims (Pet. App. 18a). Respondents' counsel was employed by Idaho Legal Aid (*ibid.*) and was not billing the class for his work. Idaho Legal Aid instructed respondents' counsel not to waive fees, but respondents' counsel recognized that petitioners appeared willing to provide the class with a beneficial pre-trial settlement only on condition that his attorney's fees be waived (*id.* at 18a-19a). Accordingly, he agreed to the settlement, but the parties included a conditional provision stating that "[p]laintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, *if so approved by the Court*" (*id.* at 10a (emphasis added)).

2. The proposed settlement was presented to the district court for approval (J.A. 88-94). That court concluded that the ethical problems of concern to respondents' counsel would be implicated only in the so-called "sweetheart" situation, in which a plaintiff's attorney might subordinate the interests of his client to his own self-interest in obtaining a fee (J.A. 93). The district court determined that no ethical problems were raised by the situation here, in which the issue was "what is fair to the attorney," rather than to the plaintiff class (*ibid.*). Noting that petitioners were "not willing to concede that they were obligated to do the things that they were doing [in the settlement] * * *, but they were willing to do them as long as their costs were outlined and they didn't face additional costs," the court found no ethical violation in a plaintiff's attorney's decision "to give up his attorney fees in the interest of getting a better bargain for his client" (*ibid.*). Accordingly, the

district court signed the settlement agreement (Pet. App. 10a) and denied respondents' motion for an award of costs and attorney's fees (*id.* at 11a-12a).

3. Respondents appealed the denial of their motion for costs and fees, and the courts of appeals reversed (Pet. App. 17a-25a). The court noted that respondents were prevailing parties by virtue of the settlement and that, absent the provision in the settlement stipulation for a waiver of fees, they would have been eligible for an attorney's fee award under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988 (Pet. App. 19a). The court of appeals then stated that, by approving the waiver of fees simply because it was contained in the stipulation, the district court had not discharged its duty under Fed R. Civ. P. 23(e) to review the reasonableness of all terms in a class action settlement, including any provision concerning attorney's fees (Pet. App. 20a). Having so found, the court of appeals then reviewed the attorney's fee waiver provision and invalidated it.

The Ninth Circuit reasoned that there are "strong public policy considerations in favor of awarding attorney's fees in suits in which representative parties serve interests broader than their own self interest," and that this is particularly true in civil rights cases (Pet. App. 22a). The court of appeals also stated that there is a special reason for courts to scrutinize an attorney's fee provision in a class action settlement because conflicts can arise in such situations, pitting the attorney's self-interest in obtaining a large fee against the client's interest in obtaining the best possible merits relief as quickly as possible (*id.* at 23a-24a).

The court of appeals noted that it had declined in the past to adopt a per se rule against simultaneous negotiation of the merits and attorney's fee issues (Pet. App. 24a-25a), but, for all practical purposes, it did so in this case, stating flatly that "[a]ttorney's fees should not have been a part of the settlement of the claims of the

class" (*id.* at 25a).[1] The court concluded that the "historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court" (*ibid.*). The Ninth Circuit ruled that the district court should instead "make its own determination of the fees that are reasonable," and it remanded the case for that purpose (*ibid.*). The court of appeals left the remainder of the settlement agreement in effect and later entered an order specifically requiring petitioners to comply with the merits portion of the settlement (*id.* at 28a).

SUMMARY OF ARGUMENT

I. The court of appeals' rule flatly prohibiting the simultaneous negotiation of the merits and attorney's fee issues rests on two premises. The first is that the only public policy at stake is that of compensating attorneys who bring successful civil rights actions, and the second is the implicit assumption that a defendant who seeks to settle the attorney's fee portion of a case along with the merits is acting in bad faith. Neither premise is correct.

The court of appeals completely overlooked the strong public interest in the settlement of litigation, an interest that is as applicable to civil rights cases as to any other type of litigation. There can be no doubt that a ban on joint negotiations will result in fewer cases being settled. If a defendant is not permitted to make a comprehensive offer that will dispose of the entire case, his incentive to settle is greatly reduced and, in many cases,

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[1] The only apparent exception to the court of appeals' absolute rule would arise upon a demonstration of "unusual circumstances," such as the Department of Justice's participation as an intervenor to represent the public interest, thereby minimizing the potential conflict of interest between the plaintiffs' lawyer and his clients. See Pet. App. 24a-25a; *Mendoza* v. *United States*, 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

eliminated entirely. See, *e.g.*, *Marek* v. *Chesny*, No. 83-1437 (June 27, 1985), slip op. 4.

The court of appeals especially erred in its unstated but nevertheless manifest assumption that defendants who want to negotiate a comprehensive settlement, including any liability for attorney's fees, are ipso facto acting in bad faith to drive a wedge between plaintiffs and their lawyers. As this Court observed in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 n.15 (1982), "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees." Moreover, there are significant numbers of relatively minor disputes, many of which may properly be classified as nuisance litigation, that defendants would be willing to settle by providing relatively modest relief, so long as they know that the settlement will bring a complete end to the litigation. Absent that certainty, however, such defendants may conclude they are better off expending the resources necessary for a trial they expect to win than settling the merits of a case while leaving themselves subject to open-ended attorney's fee liability.

Thus, the court of appeals should have recognized that there is nothing unethical about *any* reasonable settlement offer, even if it puts the plaintiff and his attorney to a difficult choice. Cf. *Marek* v. *Chesny*, slip op. 8-9. If a defendant is willing to give up a realistic chance of prevailing on the merits, then it is not at all unreasonable to expect the plaintiff to give up attorney's fees or to accept a reduced attorney's fee award. After all, if the defendant chose to litigate the case and won, the plaintiff would get *no* attorney's fees.

A prohibition on simultaneous negotiation of the merits and attorney's fees would especially discourage settlements in many cases in which the United States is a party. Under the Equal Access to Justice Act, 28 U.S.C. 2412(d), the government is not liable for attorney's fees even in a case it has lost, so long as it can demonstrate

that its position was "substantially justified." Thus, a federal agency with even a colorable defense to a lawsuit would have no incentive to settle the case if the issue of attorney's fees had to be left open, because the agency would find itself litigating the merits of the case in any event when it was called upon to demonstrate that its position, even though ultimately unsuccessful, was substantially justified. Such a result runs counter to this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

The court of appeals also erred in assuming that Congress's purposes in enacting fee-shifting statutes would be thwarted by simultaneous negotiations. In fact, there is no evidence that Congress meant to impose special restrictions on the negotiating procedures available to counsel in civil rights cases. The absence of any such evidence is particularly striking in light of the fact that Congress *has* explicitly limited the ability of private parties to settle litigation on terms that, in Congress's judgment, would be inconsistent with overriding public policy in other areas. See Portal-to-Portal Act of 1947, 29 U.S.C. 253(a).

II. The major defect in the court of appeals' analysis is the assumption that simultaneous negotiations raise such a unique ethical dilemma for plaintiffs' attorneys that no resolution short of a per se prohibition against such negotiations will suffice. In fact, lawyers are every day placed in situations in which their interests as businessmen may conflict with the duties they owe their clients. But the proper resolution of such conflicts is, in the vast majority of cases, a matter to be worked out between the plaintiff's attorney and his client; it involves neither the defendant nor the judiciary. The court of appeals utterly failed to explain—or even to consider—why the usual methods for resolving attorney/client conflicts are not appropriate in the instant situation.

We are willing to assume, however, that in a small handful of cases judicial intervention may be warranted because the defendant is acting in bad faith. If, for example, a defendant has no realistic defense to a lawsuit, his insistence on a fee-waiver provision may be an obvious attempt to evade a clear statutory attorney's fee obligation. In such cases, because courts have the authority to police the ethical conduct of lawyers appearing before them, it may be appropriate for a plaintiff to seek the aid of the district court under Fed. R. Civ. P. 16 or 23(e). But such situations should be rare, and a plaintiff should be required to make a strong preliminary showing of bad faith on the part of the defendant before a court steps in to supervise the negotiating process.

We propose this threshold requirement for two reasons. First, in the absence of unethical conduct, the courts have no inherent authority to impose their own notions of proper negotiating strategies. Second, it seems clear that a district court called upon to review the propriety of particular negotiating tactics could do so only after such a thorough review of the case that the matter might as well be tried instead of settled. In the absence of any evidence that bad faith settlement offers are widespread, it would be a mistake to permit the routine invocation of rather elaborate judicial machinery that is likely to prove nearly as time consuming and cumbersome as a trial.

III. Even if the court of appeals correctly imposed a ban on simultaneous negotiation of the merits and attorney's fee issues, the court clearly erred in striking the attorney's fee waiver provision from the settlement agreement in this case while requiring petitioners to comply with the remainder of the agreement. Courts have no roving authority selectively to strike provisions from a decree negotiated by the parties to the litigation; if a court concludes that one portion of the agreement is invalid, the proper remedy is to disapprove the entire agreement and to send the parties back to the bargain-

ing table or allow them to litigate their dispute. In this case, the record is clear that petitioners would not have agreed to the consent decree absent the waiver-of-fees provision. See J.A. 92, 109-110, 115. Accordingly, the court of appeals erred in holding petitioners to a "bargain" to which they never consented.

ARGUMENT

I. A PER SE RULE AGAINST THE SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES AND MERITS ISSUES IS IMPRACTICAL AND INCONSISTENT WITH THE PUBLIC POLICY FAVORING THE SETTLEMENT OF LITIGATION

Permeating the court of appeals' analysis of this case are two clearly mistaken assumptions. The first is the court's apparent view that only one public policy is implicated—that of compensating attorneys who bring successful civil rights actions. The second is an unstated but nonetheless manifest presumption that defendants who want to settle the attorney's fee portion of a case along with the merits are acting in bad faith. Had the court taken a broader view of the public policies at stake and been less eager to attribute improper motives to defendants, it would have been apparent that the rule it has adopted is both counterproductive and impractical.[2]

A. A Per Se Rule Would Seriously Inhibit The Settlement Of Litigation

The court of appeals completely overlooked the strong public interest in the settlement of litigation, an interest that is as applicable to civil rights cases as it is to any other type of litigation. See, *e.g.*, *Marek* v. *Chesny*, No.

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[2] It is not at all clear how much of the court of appeals' analysis turned on the fact that the instant case is a class action and how much depended on the court's apparent perception that civil rights cases, whether brought as class actions or not, are to be encouraged at all costs. In our view, however, the rule adopted by the court of appeals does not appear to be limited to class action litigation.

83-1437 (June 27, 1985), slip op. 8; *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 363-364 (1981) (Powell, J., concurring); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 40 (1974). Indeed, the public policy favoring settlements is in many respects at its strongest in civil rights litigation, because the parties often have to deal with each other after the litigation ends. Thus, any rule that discourages settlements should be closely scrutinized.

The per se rule adopted by the court of appeals surely would discourage settlements. As this Court noted in *Marek*, slip op. 4, "[i]f defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers." The Court made the same point in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 n.15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees."). See also, *e.g.*, *Moore* v. *National Ass'n of Securities Dealers, Inc.* (*NASD*), 762 F.2d 1093, 1104-1105 (D.C. Cir. 1985) (opinion of MacKinnon, J.); *id.* at 1112 (Wald, J., concurring); *Malchman* v. *Davis*, 761 F.2d 893, 905 (2d Cir. 1985); *id.* at 907 (Newman, J., concurring); *Lazar* v. *Pierce*, 757 F.2d 435, 439 (1st Cir. 1985) (Torruella, J., concurring). In fact, it often would be irresponsible for defense counsel to agree to a settlement without knowing the full monetary impact on his client. Accordingly, defendants and their counsel necessarily would discuss among themselves the issue of attorney's fees, but they would be barred, under the court of appeals' per se rule, from discussing that issue with plaintiffs' counsel. The result would be a counterproductive breakdown in communications between the parties that inevitably would reduce the number of cases settled. See, *e.g.*, *Moore* v. *NASD*, 762 F.2d at 1112 (Wald, J., concurring) (footnote omitted) ("[I]t seems quite unrealistic to cabin the bar-

gaining by forbidding the defendant, regardless of the circumstances, to tell the plaintiff *why* the defendant is refusing overtures, if the reason is an unwillingness to pay fees.").

Thus, in cases in which a defendant believes that he has at least a reasonable possibility of success at trial, it may be impossible to decide whether to accept a settlement offer on the merits if he cannot know the full extent of his liability. Crucial information needed for informed decisionmaking is missing. A defendant will know only that, after agreeing to a compromise on the merits, he could be faced with a large attorney's fee award imposed by the district court.[3] What is particu-

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[3] It has been suggested that this problem can be avoided if plaintiffs' attorneys advise defendants of the number of hours of work for which they will seek reimbursement, and at what rate. This suggestion does not adequately protect defendants, because it tells them only what the outermost limit of their liability might possibly be. See *Moore* v. *NASD*, 762 F.2d at 1105 n.16 (opinion of MacKinnon, J.). That figure may bear no realistic relationship to defendants' ultimate liability pursuant to a court-ordered attorney's fee. In one recent case, for example, the district court, following the entry of a consent decree on the merits, awarded plaintiffs' counsel $1,129,450 in attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). On the government's appeal, the Ninth Circuit reduced the award to $322,700. *Underwood* v. *Pierce*, 761 F.2d 1342 (1985). Although even that amount is still being contested by the government, the $806,750 difference between the initial award and the reduced award on appeal is clearly so great that, even had the government been advised in advance of the maximum amount that plaintiffs intended to seek in fees, it would have had no incentive to settle if, as was the case in *Underwood*, its litigation judgment convinced it that plaintiffs had no reasonable prospect of recovering the amount they sought.

Another problem with the proposed "solution" of having plaintiffs advise defendants of what they intend to seek in fees is that, notwithstanding this Court's decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), "multipliers," or "upward adjustments," remain essentially a wild card in attorneys' fee litigation. It is our experience that plaintiffs frequently submit fee applications detailing the hours they have expended on a case and the hourly rate they seek, but then add a conclusory request for a "multi-

larly disturbing about the court of appeals' per se rule is that it prohibits the parties from negotiating attorney's fee issues even when both sides would otherwise be able to agree on what would constitute a reasonable fee. The decision below is not limited to those cases in which defendants insist that plaintiffs' counsel waive all fees, even though there is no conceivable public policy that could justify the preclusion of package settlement proposals that might in fact be acceptable to both plaintiffs and their attorneys.

In addition, there are large numbers of relatively minor disputes, some of which may properly be classified as nuisance suits, that the government, or any defendant, would be willing to settle in lieu of expending the resources necessary for a trial. But no sensible defendant is likely to find settlement attractive if, instead of saving the money needed to try a case, it finds itself saddled with the plaintiff's attorney's fees. In such cases, a defendant's insistence on a waiver of fees in return for an agreement to provide relatively modest relief on the

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plier" without specifying the factor by which they believe the award should be enhanced. (The respondents in *Blum* did exactly that. See slip op. 10.) Often, the district courts respond to such requests seemingly by picking a number out of the air, sometimes resulting in a doubling or tripling of the "lodestar" fee request.

Finally, there is significant room for compromise in disputes, such as the amount of an attorney's fee award, that involve only money. The amount that a plaintiff's attorney might willingly accept in settlement will often be far less (even half) than what he would ask for in a fee request to a court. For that reason as well, defendants will not derive realistic information if all they are told is the maximum amount that the plaintiff will seek in fees. See generally *Ashton* v. *Pierce*, 580 F. Supp. 440, 444 (D.D.C. 1984) ("Unable to settle the question of fees outside the court, lawyers make excessive claims [in court]. * * * * * Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. * * * Failure to reach prompt and reasonable fee dispositions * * * may eventually jeopardize the golden goose.").

merits does not indicate bad faith bargaining at all; rather, it suggests nothing more than common sense. See, *e.g.*, *Lazar* v. *Pierce*, 757 F.2d at 438 (federal agency properly insisted that plaintiff waive any claim for fees against the government because it settled the merits by agreeing to a "gratuitous republication" of its existing regulations); *Gram* v. *Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982) ("[N]uisance settlements should not give rise to fee awards."); *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d 127, 131 (10th Cir. 1980) (same); *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977) (same). Accordingly, the rule adopted by the court of appeals eliminates a crucial element of negotiating flexibility needed to keep minor disputes from being litigated unnecessarily.

A prohibition on simultaneous settlement negotiations encompassing the merits and attorney's fees would especially discourage settlements in many cases in which the United States is a party. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), provides that certain parties who prevail in litigation against the government are entitled to an attorney's fee award unless the government can show that its position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).[4] The mere fact that the government loses a case was *not* intended to create a presumption that its position lacked "substantial justification." S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 11 (1980). Indeed, the government need not even demon-

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[4] Section 2412(d) of the EAJA was enacted with a sunset provision, and it expired on October 1, 1984. See 28 U.S.C. 2412 note. The 98th Congress passed a bill intended to make the section permanent, but the President vetoed it. On June 24, 1985, the House passed H.R. 2378, 99th Cong., 1st Sess., another bill to reauthorize Section 2412(d) on a permanent basis, and the bill is now under consideration by the Senate. Although the new statute would differ in some respects from the prior one, the "substantial justification" provision would remain unchanged.

strate that "its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra*, at 7; H.R. Rep. 96-1418, *supra*, at 11. See also 131 Cong. Rec. H4763 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier) ("Proving [substantial justification] is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.").

In light of the standard for "substantial justification," there is little reason for a federal agency with a colorable defense to a lawsuit to enter into a settlement that does not resolve the entire case, including any attorney's fee issues. If it did, the agency would in all likelihood find itself shortly thereafter litigating the merits of the case when it was called upon to demonstrate "substantial justification" for its position in response to a request for fees under EAJA. And if the government must litigate the merits anyway, the major incentive for settlement has been removed. Therefore, a ban on simultaneous negotiations would often have the effect of inducing the government to take its chances at trial, even though a settlement otherwise would have been possible.

Such a result clearly makes no sense. This Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). But any incentive to settle a fee dispute is greatly diminished, if not entirely eliminated, once the merits of the litigation have been concluded. The defendant, having agreed to provide relief on the merits, is left with no leverage to induce a plaintiff to discount what may be a totally unrealistic demand for fees. And the plaintiffs in a case such as this one, having obtained satisfactory relief through settlement and under no obligation to pay their attorney's fees themselves, no longer have an interest in the fee dispute and therefore will not serve as a check on their attorney's efforts to obtain a sizeable fee. The net

result often will be a "second major litigation" devoted solely to attorney's fees.

Finally, it should not be forgotten that settlements are as much in the interests of plaintiffs as defendants. See, *e.g.*, *Marek* v. *Chesny*, slip op. 8. For example, a plaintiff may realize after some discovery that he does not have a strong claim on the merits. See *Moore* v. *NASD*, 762 F.2d at 1098-1099 (opinion of MacKinnon, J.). The plaintiff may be reluctant to abandon his claim entirely, but he may be willing to settle for reduced relief. Such a settlement would be difficult to reach if the defendant in the case cannot be assured that the agreement will conclude the litigation entirely. Similarly, a per se rule against package settlements may often result in a defendant's making a substantially less favorable offer on the merits than might otherwise be the case, in order to provide himself with an "economic cushion" in the event that, after settlement, he finds himself facing a substantial attorney's fee request.

The conclusion is inescapable that a rule barring joint negotiation of the merits and attorney's fee issues would have the negative result of causing more cases to be tried unnecessarily. Such a rule would be contrary to the public policy of encouraging settlements, and it should be rejected.

B. This Court And Several Lower Courts Have Declined To Adopt A Per Se Rule Barring Joint Negotiations

In recognition of the impediments to settlement just discussed, most courts that have considered the propriety of simultaneous merits and attorney's fee negotiations have declined to adopt the per se rule imposed by the court below. Indeed, this Court itself rejected such a rule in *White* v. *New Hampshire*, *supra*. There, the issue before the Court was whether a request for attorney's fees is a motion to alter or amend the judgment that must be filed within the 10 days prescribed by Fed. R.

Civ. P. 59(e). In arguing that Rule 59(e) was inapplicable to fee requests, the petitioner in *White* contended that "fee negotiations should routinely be deferred until after the entry of a merits judgment" in order to avoid potential conflicts of interest between the plaintiff and his attorney (455 U.S. at 454 n.15). The Court was not swayed by the argument (*ibid.*):

> Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.[5]

Similarly, the court of appeals in *White* endorsed simultaneous negotiations. The court stated: "Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. * * * Failure to confront the fees issue merely muddies the waters * * *." *White* v. *New Hampshire Dep't of Employment Security*, 629 F.2d 697, 705 (1st Cir. 1980), rev'd on other grounds, 455 U.S. 445 (1982). More recently, the First Circuit upheld the denial of a fee award against the Department of Housing and Urban Development, notwithstand-

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[5] In response to the Court's request for the views of the United States, the government filed a brief at the petition stage in *White*, in which we stated that "detailed fee discussions should ordinarily be conducted after agreement on the merits has been reached" in order to avoid the ethical considerations raised by White. Br. for the United States as Amicus Curiae, at 11. Upon further reflection, and with the benefit of nearly four years of experience under the Equal Access to Justice Act, 28 U.S.C. 2412(d), we have concluded that our earlier suggestion was impractical and that the ethical concerns, though not insignificant in particular cases, are neither so frequent nor so intractable as to call for the per se rule adopted by the court of appeals.

ing the fact that the agency had insisted on an attorney's fee waiver provision as part of the settlement of the case. *Lazar* v. *Pierce*, *supra*. The court implicitly approved HUD's insistence on the combined merits and fee waiver arrangement because of the strength of the agency's defense on the merits (757 F.2d at 438).[6]

The Second Circuit also has recently concluded that joint settlement negotiations are proper, in large part because they lead to more settlements. *Malchman* v. *Davis*, 761 F.2d 893, 905 (1985). In *Malchman*, certain members of the plaintiff class attacked the final settlement, arguing that it was fatally tainted by joint negotiations on the merits and attorney's fees. While noting that simultaneous negotiations can sometimes cause conflicts between a class and its attorneys, the Second Cir-

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[6] However, the First Circuit criticized the conduct of other defendants in the case who had agreed to provide essentially full merits relief for the plaintiff, but only in exchange for a waiver of fees (757 F.2d at 437). The court disapproved of the conduct of those defendants because it believed that, unlike HUD, they were using the settlement process to avoid a statutory fee obligation (*ibid.*).

At the same time, the First Circuit also attacked the conduct of plaintiff's counsel, who had signed the settlement stipulation with full knowledge that he intended to renege on the waiver-of-fees provision as soon as it was entered (757 F.2d at 438-439). Employing a novel approach to the issue presented in this case, the court then concluded that joint negotiations do not necessarily cause an ethical dilemma for plaintiff's counsel; the court reasoned that, when statutory fee-shifting provisions are involved, a lawyer has a public duty to collect a fee from the defendant so that other attorneys will be encouraged to accept like cases in the future (*id.* at 438). Consequently, the court concluded that a plaintiff's attorney may be able to decline a settlement offer that is favorable to his client when the defendants offer too low a fee or seek a complete waiver of fees (*ibid.*). Although the court's reasoning was certainly innovative, it seems to be a classic example of the tail wagging the dog, and we doubt that it can be squared with a lawyer's unflagging duty to represent his client's interests. See, *e.g.*, ABA Model Code of Professional Responsibility EC 5-1 to 5-24 (1969). See also *Lazar* v. *Pierce*, 757 F.2d at 440 (Torruella, J., concurring), and note 10, *infra*.

cuit nevertheless upheld the attorneys' fee award because there was no evidence of a "sweetheart" deal between the defendants and the attorneys for the class. Citing this Court's decision in *White* v. *New Hampshire*, *supra*, the Second Circuit concluded that, "[a]bsent special circumstances," joint settlement negotiations should not be barred (761 F.2d at 905).

Similarly, the District of Columbia Circuit has declined to impose a general rule against joint negotiations *Moore* v. *NASD*, 762 F.2d at 1104 (opinion of MacKinnon, J.); *id.* at 1113-1114 (Wald, J., concurring). The court held that a representative plaintiff in a class action may "voluntarily and on [his] own initiative" offer to waive an attorney's fee in order to reach a settlement (*id.* at 1105 (opinion of MacKinnon, J.)). The court so ruled in the context of a case in which the plaintiff recognized that her claim on the merits was not strong, and she agreed to accept as a settlement a plan that the defendant contended it had intended to adopt in any event.[7] Two other courts of appeals also have stated that plaintiffs are free to waive fee awards as part of an overall settlement. See *Gram* v. *Bank of Louisiana*, 691 F.2d at 730; *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d at 132.

The Third Circuit, by contrast, has criticized the practice of simultaneous negotiations and, in the seminal decision on the issue, apparently imposed a per se ban against the practice. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (1977). There, the court was concerned that simultaneous negotiations could lead to "sweetheart" deals between the defendants and the plaintiffs' class counsel, to the detriment of the class (*ibid.*). However, the court failed to consider the problems accompanying any rule requiring bifurcated negotiations, and *Prandini*

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[7] The court reserved the question of the propriety of a defendant's settlement offer that encompasses both the merits and attorney's fees and costs (762 F.2d at 1105 n.17 (opinion of MacKinnon, J.)).

is therefore of limited value. Indeed, the Third Circuit itself has recently recognized, but not had occasion to resolve, the problems created by *Prandini*. *El Club del Barrio, Inc.* v. *United Community Corporations, Inc.*, 735 F.2d 98, 101 n.3 (1984). Finally, two other circuits have noted the concern addressed in *Prandini*, but they have not adopted any per se rule governing settlement negotiations. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 582-583 (8th Cir. 1981); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 n.71 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

In short, the courts of appeals, as well as this Court in *White*, have recognized, either directly or implicitly, that the *Prandini* approach creates at least as many problems as it purports to solve. The court below, on the other hand, failed even to recognize the difficulties it was creating, and its opinion is lacking in persuasive force. See *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977) ("*Per se* rules often represent the abdication of judicial discretion rather than its informed exercise.").[8]

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[8] There is an additional irony in the Ninth Circuit's ruling that should not go unmentioned. Although the court rested its decision in large part on concerns unique to class actions (see, *e.g.*, Pet. App. 23a), it completely overlooked the fact that the Manual for Complex Litigation, while noting that simultaneous negotiations may cause conflicts of interest, nevertheless requires that *all* amounts to be paid by the defendants in a class action settlement "should be known and disclosed at the time the fairness of the settlement is considered." 1 *Moore's Federal Practice* Pt. 2, ¶ 1.46, at 74 (2d ed. 1984) (footnote omitted). The reason for this disclosure requirement is to guard against the possibility that class counsel may be "more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs." *Id.* at 75. Although that is not the concern in this case, the Ninth Circuit nevertheless stated that the two situations, *i.e.*, "sweetheart" deals and "sacrifice" demands, are essentially similar (Pet. App. 23a), yet it never discussed the Manual's conclusion that simultaneous negotiation and disclosure is the appropriate course of action.

C. There Is No Indication That Congress Thought Joint Negotiations Would Thwart The Goals Of Fee-Shifting Statutes

The court of appeals based its decision in part on Congress's intent to promote the bringing of meritorious civil rights actions, as evidenced by the enactment of fee-shifting statutes such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 (Pet. App. 21a-23a). Significantly, however, there is no evidence that Congress deemed a prohibition on simultaneous negotiations necessary to the accomplishment of the goals of attorney's fee statutes such as Section 1988 or the EAJA. As the D.C. Circuit found in *Moore* v. *NASD*, 762 F.2d at 1100 (opinion of MacKinnon, J.), there is no indication in either the language or legislative history of Section 1988 or the analogous attorney's fee provision contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), that Congress meant to restrict the negotiation and waiver of attorney's fees. Moreover, in a recent report accompanying H.R. 2378, the bill to reauthorize the EAJA (see note 4, *supra*), the House Judiciary Committee made clear its assumption that joint negotiations are permissible. See H.R. Rep. 99-120, 99th Cong., 1st Sess. 18-19 (1985). For certain types of cases, the Committee "presumed that any claim for expenses and fees under the [EAJA] which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim" (*ibid.*).

In the same vein, Congress has required civil rights plaintiffs to comply with the procedural rules applicable to all other types of litigation. In *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Fed. R. Civ. P. 23. Similarly, the Court refused to find that Congress implicitly intended to exempt civil rights cases

from the ordinary operation, under 28 U.S.C. 1738, of res judicata, *Migra* v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984), slip op. 4-9; *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982), and of collateral estoppel, *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). It is clear, therefore, that the court of appeals erred in supposing that Congress would have intended a special rule to govern settlement negotiations in civil rights cases.

This absence of special legislative treatment of civil rights cases is of some significance, because Congress *has* explicitly limited the ability of parties to negotiate settlements in other contexts. Under the Portal-to-Portal Act of 1947, 29 U.S.C. 253(a), for example, Congress prohibited the settlement of causes of action on terms that would be inconsistent with the requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, the Walsh-Healey Act, 41 U.S.C. 35, or the Bacon-Davis Act, 40 U.S.C. 276a *et seq.* Cf. *Wilko* v. *Swan*, 346 U.S. 427 (1953) (parties may not agree to settle securities law disputes through arbitration, but must instead pursue the judicial remedies provided in the Securities Act of 1933). Thus, Congress is fully capable of restricting the ability of parties to settle litigation on their own terms when it believes that such restrictions are necessary to effectuate particular public policies. As one court has noted, however, the issue in this case does not implicate "one of those situations in which Congress has prohibited settlements covering payment of attorneys' fees." *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d at 132. Good faith settlement offers, even if they present plaintiffs and their counsel with hard choices, are in no way inconsistent with the goals of civil rights fee-shifting statutes. See *Marek* v. *Chesny*, slip op. 8-9.

D. A Defendant's Insistence on Simultaneous Negotiation Of The Merits And Attorney's Fee Issues Is Not Inherently Unethical

For the many reasons we have previously noted, a defendant's offer of settlement conditioned on a waiver of

fees or the payment of fees in an amount less than that demanded by the plaintiff is not ipso facto indicative of bad faith or unethical conduct. This also was the conclusion of a special subcommittee appointed by the Chief Judges of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit (Bar Report of the District of Columbia Bar, *Final Subcommittee Report of the Committee on Attorneys Fees* (Aug./Sept. 1984)):

> [The subcommittee] recognized that the purpose of [simultaneous] settlement offers is not, in most cases, to create an attorney-client conflict, nor to punish or deter plaintiffs' attorneys from taking on fee shifting cases. Generally speaking, the reason that defendants make such offers is to limit their total exposure, which could not occur if a two-stage settlement process were mandatory.

We know of no evidence to refute the subcommittee's conclusion that bad faith offers are simply not at issue in the vast majority of cases. To the contrary, a defense attorney who failed to negotiate a comprehensive settlement, including his client's liability for attorney's fees, might well be acting negligently. There is, in short, nothing unethical in a defendant's proposing *any* good faith settlement, even if it puts the plaintiff and his attorney to a difficult choice. Cf. *Marek* v. *Chesny*, slip op. 8-9.

If a defendant gives up a realistic chance of prevailing on the merits in a debatable case, then it seems not at all unreasonable to propose that a plaintiff give up the possibility of full attorney's fees. In the typical civil rights case, a defendant will have made a substantial concession with respect to attorney's fees merely by agreeing to settle the merits, because it is well established that a plaintiff who prevails through settlement ordinarily is entitled to an attorney's fee award under Section 1988. See, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). In exchange for the defendant's implicit concession concerning plaintiff's *eligibility* for a fee award, it is perfectly reasonable for the defendant to propose that the plaintiff make a

comparable concession with respect to the *amount* of any fee award. After all, if the defendant litigated and *won* on the merits, the plaintiff would get *no* attorney's fees.[9]

We further note that any presumption of bad faith or unethical conduct is particularly unwarranted when the government seeks a waiver of attorney's fees under the EAJA. As previously explained (see pages 13-14, *supra*), the United States is not liable for fees under the EAJA if its position on the merits, even though ultimately unsuccessful, was "substantially justified." In a debatable case, therefore, the United States may properly conclude that its chances of prevailing at trial are marginal, but that its defenses nevertheless meet the test of substantial justification. If the United States proposes a settlement offer in such a case, it may fairly condition that offer on a waiver of attorney's fees, based on its assessment that it would not be held liable for fees even if it litigated the case and lost. In a case of this type, there can be no credible claim that the government's negotiating practices are improper.

E. The Tensions That May Be Occasioned By Simultaneous Negotiations Are In Many Respects No Different In Kind From Other Ethical Dilemmas Routinely Confronted By Lawyers

The judgment below is based on the view that the simultaneous negotiation of attorney's fees and merits

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[9] On the other hand, we recognize that a defendant who has no realistic defense on the merits gives up nothing when he makes a settlement offer, and it cannot be a good faith settlement proposal to give up nothing in return for something, to wit, the plaintiff's waiver of attorney's fees. Such cases, however, appear to be quite rare, and the court of appeals' per se rule is surely judicial overkill in the absence of any evidence that bad faith offers are a common practice on the part of defendants. In the instant case, we know of no evidence in the record that would support a finding of bad faith on the part of petitioners, and the court of appeals did not rest its decision on any such finding. Indeed, at the time that the parties negotiated their settlement, the district court already had granted summary judgment against respondents on most of their claims (J.A. 56-57), and thus it cannot be contended that this was a case in which petitioners had no viable defenses.

issues raises a unique ethical problem for plaintiffs' counsel that requires a prophylactic rule. However, as the Court recognized in *White* v. *New Hampshire*, 455 U.S. at 454 n.15, it is not at all obvious that the ethical problem perceived by the Ninth Circuit is irresolvable in the absence of a special rule. Indeed, lawyers are every day placed in situations in which their own interests as businessmen may conflict with their clients' needs, but it has never been supposed that judicial intervention in the attorney/client relationship is necessary to deal with those problems.

For example, an attorney who has taken a case on a contingent fee basis may have quite a different reaction to a settlement proposal than his client. The attorney may view the case as weak and want the client to accept a low settlement offer on the theory that any recovery is better than none. The client, on the other hand, may firmly believe that he can obtain a more favorable judgment at trial. Or the situation may be reversed, with the client anxious to accept even a low settlement offer because, for personal, financial, or emotional reasons, he wants to avoid a trial. The lawyer, on the other hand, may feel that he has invested too much time and effort in the litigation to accept a low settlement offer. In either event, when the lawyer advises his client whether to accept the settlement offer, he must of course put aside entirely his personal interest in a large percentage recovery.

Numerous similar examples could be imagined; indeed, they are inherent in a system that demands that an attorney put his client's interests above his own.[10] The important point, however, is that the consequences of conflicts of this sort cannot fairly be visited upon the de-

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[10] Contrary to the suggestion of the First Circuit in *Lazar* v. *Pierce*, 757 F.2d at 438, that rule is no different in civil rights cases. See *Brown* v. *General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (stating, after examining the Civil Rights Attorney's Fees Awards Act of 1976, that "[t]here is simply no reason to believe that Congress intended to diminish substantially the attorney's duty of undivided loyalty to his or her client.").

fendant; their proper resolution is a matter between the plaintiff's attorney and his client. A fundamental flaw in the lower court's decision is its failure even to mention, much less explain, why, at least for the vast majority of cases, the usual methods available to lawyers faced with ethical dilemmas cannot be employed here. Unlike this Court in *White*, 455 U.S. at 454 n.15, the Ninth Circuit was apparently of the view that "no resolution is ever available to ethical counsel." But the D.C. Circuit has recently refuted that notion by suggesting several viable options (*Moore* v. *NASD*, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.)):

> [P]laintiffs' counsel could reduce the ethical tension by informing their clients early on of the potential conflict of interest. If the conflict does arise, full disclosure and client participation in the settlement negotiations may mitigate its effect. Alternatively, carefully drafted retainer agreements could minimize the potential conflicts—*e.g.*, by vesting the statutory fee recovery in the client. By this method, the attorney and client would no longer have the independent claims for fees which create the conflicts of interest in simultaneous negotiations.[11]

Judge Wald offered equally pertinent observations (*Moore* v. *NASD*, 762 F.2d at 1112 n.1 (Wald, J., concurring)):

> [M]y belief is that most public interest counsel explain the financial details of the litigation well in

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[11] In this respect, it should not be forgotten that fee-shifting statutes typically provide that a district court, in its discretion, "may allow the prevailing *party* * * * a reasonable attorney's fee" (42 U.S.C. 1988 (emphasis added)). See, *e.g.*, *Brown* v. *General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) ("Under [42 U.S.C. 1988] it is the prevailing party rather than the lawyer who is entitled to attorney's fees."); *Oguachuba* v. *INS*, 706 F.2d 93, 97 (2d Cir. 1983) (same rule under Equal Access to Justice Act); *White* v. *New Hampshire Dep't of Employment Security*, 629 F.2d at 703 ("award of attorney's fees goes to 'prevailing party,' rather than attorney"); *Smith* v. *South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) ("[A]n award [of attorney's fees] is the right of the party suing not the attorney representing him.").

> advance to their clients, and that few clients will against the advice of counsel leap to accept a settlement that deprives counsel of fair compensation and themselves of any provision for costs. In my experience, respected counsel do not and should not undertake public interest representation until an understanding is had with clients as to the range of appropriate settlements. On balance, I do not believe the likelihood that irresolvable problems between counsel and clients may occur is high enough to justify [a per se rule].

In the vast majority of cases, therefore, plaintiffs' lawyers should be able to resolve with their clients any problems associated with simultaneous negotiations. Neither defendants nor the courts need play any role in that process.

F. Judicial Supervision Of Negotiating Practices Should Be Limited To Cases In Which Plaintiffs Are Able To Make A Strong Preliminary Showing Of Bad Faith On The Part Of Defendants

In addition to the usual methods for resolving attorney/client conflicts of interest discussed above, it has been suggested that plaintiffs' counsel may invoke the aid of the district court under Fed. R. Civ P. 16 or 23(e). See, *e.g.*, *Moore* v. *NASD*, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.); *id.* at 1113 n. 4 (Wald, J., concurring); *Lazar* v. *Pierce*, 757 F.2d at 438. Although we can envision exceptional cases in which that course of action might be appropriate, judicial regulation of settlement negotiating practices as a matter of course strikes us as a "solution" that is likely to create as many difficulties as the "problem."

We are willing to assume that at least in some cases it will be plain that a defendant has no good defense and is using simultaneous settlement negotiations as a tactic to evade a clear statutory attorney's fee obligation. See note 9, *supra*. In such cases, it may be appropriate for the plaintiff to ask the district court to intervene to police the conduct of lawyers appearing before the court.

But a mere allegation by plaintiff's counsel that it is per se improper for a defendant to insist on negotiating the entire case as a package should not be sufficient to entitle the plaintiff to a hearing before the district court. We have already demonstrated that package settlements are *not* inherently unethical and, indeed, they are a necessary component of the public policy favoring the settlement of litigation. Accordingly, we submit that a plaintiff should be required to make a strong preliminary showing of bad faith on the part of the defendant before a district court steps in to supervise the negotiating process. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978) ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory * * *. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.").

We propose this threshold standard because, absent bad faith and unethical conduct, it is simply not the role of the courts to tell parties how to structure their settlement proposals. Moreover, as a practical matter, it seems clear that a district court called upon to review the propriety of particular negotiating tactics could do so only after conducting such a thorough review of the case that the matter might as well be tried instead of settled. For example, the court would have to assess, among other factors, the relative strength of each side's case on the merits in order to determine whether a defendant's settlement offer was made in good faith. This would be akin to the "likelihood of success" inquiry required of a district court ruling on a motion for a preliminary injunction. The judicial resources necessary to make such a determination should not be routinely invoked absent a credible showing that improper behavior is in fact occurring. In addition, the court might be called upon to review in considerable detail "the course of negotiations," but "[r]equiring the district court to inquire into the circumstances of settlement negotiations and to determine who said what to whom when seems a pointless

exercise * * *." *El Club del Barrio, Inc.* v. *United Community Corporations, Inc.*, 735 F.2d at 100.

Finally, Rules 16 and 23(e) of the Federal Rules of Civil Procedure, although theoretically available to resolve ethical disputes, were never intended to address the type of problem presented in this case. The purpose of a "fairness" hearing under Rule 23(e), for example, is to protect the interests of absent class members, not the interests of class counsel. See 3B *Moore's Federal Practice* ¶ 23.80[2.-1] (1985 ed.); *id.* ¶ 23.80[4], at 23-519 to 23-520.[12] And while it is true that Rule 16(a)(5) provides that one of the purposes of a pre-trial conference is to facilitate the settlement of a case, it has never been thought that district courts should intervene in settlement negotiations to the extent of dictating the parties' strategic decisions. Again, therefore, it should be the rare case in which judicial regulation of the settlement process is an appropriate response to the problem perceived by the Ninth Circuit.

II. THE COURT OF APPEALS ERRED IN ORDERING PETITIONERS TO PAY RESPONDENTS' ATTORNEY'S FEES WHILE LEAVING THE REMAINDER OF THE SETTLEMENT "AGREEMENT" INTACT

Even if the court of appeals had correctly determined that "[a]ttorney's fees should not have been a part of the settlement of the claims of the class" (Pet. App. 25a), the court clearly erred in striking the attorney's fee

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[12] For this reason, a Rule 23(e) hearing may well be the proper forum in which to resolve allegations of "sweetheart" deals, in which plaintiffs' attorney's fee is enhanced at the expense of the recovery for the class. Indeed, the Third Circuit's decision in *Prandini, supra,* arose out of just such a concern (557 F.2d at 1020-1021). In the instant case, however, the Ninth Circuit has adopted the Third Circuit's approach to "sweetheart" deals for the wholly distinct purpose of ferreting out "sacrifice" demands. Fairness hearings under Rule 23(e) were never intended for that purpose.

waiver provision from the settlement agreement while leaving the remainder of the agreement intact. Courts have no authority to impose their own notions of a proper settlement on the parties, but that is the effect of the Ninth Circuit's ruling in this case.

As this Court has noted, "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). Settlement agreements often reflect complex compromises under which the parties "each give up something they might have won had they proceeded with the litigation" (*id.* at 681). For that reason, courts are not free to modify settlement agreements based on their own notions of fairness or proper outcome. *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), slip op. 11-12; *United States* v. *Armour & Co.*, 402 U.S. at 681-682. See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) (NLRB may require employers and employees to negotiate, but it may not compel "agreement" on any substantive provisions of a collective bargaining agreement).

Of particular relevance to this case is the recognition by lower federal courts that a court examining a proposed class action settlement under Fed. R. Civ. P. 23(e) may not selectively strike provisions in the agreement; rather, it must either approve or disapprove the compromise as a whole. See *Officers for Justice* v. *Civil Service Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) ("Neither the district court nor this court is empowered to rewrite the settlement agreement agreed upon by the parties. We may not delete, modify, or substitute certain provisions of the consent decree. Of course, the district court may suggest modifications, but ultimately, it must consider the proposal as a whole and as submitted."); *Moore* v. *NASD*, 762 F.2d at 1109-1110 & n.21 (opinion of MacKinnon, J.); *id.* at 1114 (Wald, J., concurring); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d at 1172; *Cot-*

ton v. *Hinton*, 559 F.2d 1326, 1331-1332 (5th Cir. 1977).

This rule applies *a fortiori* to cases involving simultaneous merits and attorney's fee negotiations. As previously discussed, a defendant in many instances may be willing to settle a case even though he has a strong defense, because he wishes to end the litigation with little or no cost. He may not be willing to settle such a case if he has to pay the plaintiff's attorney's fees. Clearly, this is a choice that only the defendant can make.[13]

Thus, courts should not strike a fee waiver provision alone, leaving the remainder of the settlement intact, in the absence of any evidence that the defendant would have agreed to such a settlement. In this case, the record demonstrates that petitioners would *not* have agreed to the settlement without the waiver-of-fees provision. As the district court noted in explaining its denial of respondents' motion to compel petitioners to comply with the settlement even while the attorney's fee appeal was pending, the settlement agreement was a package deal.[14] The court of appeals' contrary ruling (J.A. 117, 119) was clearly incorrect.

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[13] The rule also holds true even if the court perceives that the defendant has a weak case on the merits and should settle even without a fee waiver. This does not mean that defendants will be able to engage in arguably improper settlement tactics with impunity (see pages 26-27, *supra*). If a court disapproves a proposed settlement because of improper negotiating tactics by the defendant, the defendant will eventually be charged for the time spent by the plaintiff's attorney when an attorney's fee ultimately is awarded. In addition, the court may impose sanctions on defense counsel who have acted unethically, or refer such cases to the appropriate disciplinary bodies. Such measures, which would be directly responsive to the unethical conduct of concern to the court of appeals, surely would deter bad faith offers in the future and would ensure that punishment was imposed on the blameworthy lawyer rather than on his client.

[14] The district court stated (J.A. 115):

> [T]he [petitioners'] signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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> The Court made that finding and signed the stipulation. * * * The [petitioners] entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect.

See also J.A. 92, 109-110.

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